IN THE

Supreme Court of the United States

No. 79-737

BLUE BELL, INC., a corporation, et al.,

Petitioner

vs.

MARLON LOUIS FOWLER, Individually and on behalf of all others similarly situated,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Blue Bell, Inc., respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on June 15, 1979.[1]

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 596 F. 2d 1276 and is reproduced in the Appendix to this Petition.

[1]Blue Bell's Petition for Rehearing and Rehearing En Banc was denied on August 9, 1979.

The Findings of Fact and Conclusions of Law, as well as the Judgment, of the District Court are reported unofficially at 14 FEP Cases 1009 (N.D. Ala., 1976), and are reproduced in the Appendix to this Petition.

The appeal in this case was decided in conjunction with the case of *Bernard v. Gulf Oil Company*, reported at 596 F. 2d 1249.

Blue Bell's petition for a rehearing by the full Court was denied on August 9, 1979, as reported at 601 F. 2d 1195 (5th Cir., 1979). On September 27, 1979, the Court of Appeals granted a petition filed by Gulf Oil Company for such a rehearing. A copy of that Order is reproduced in the Appendix to this Petition.

JURISDICTION

The decision of the Court of Appeals was entered on June 15, 1979. Blue Bell's subsequent Petition for Rehearing En Banc was denied on August 9, 1979. Jurisdiction to review, by Writ of Certiorari, that decision of the Court of Appeals is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. In holding that time consumed by the Equal Employment Opportunity Commission incident to its administrative processing of charges of discrimination may not, under any circumstances, be considered in assessing delays in the bringing of private Title VII actions, did not the Court of Appeals thereby necessarily

eliminate this equitable defense in all such private actions, contrary to the holdings of this Court and of the Court of Appeals itself, and contrary to the statutory command that Title VII actions are equitable in nature?

2. When a private Title VII claimant, in addition to the Equal Employment Opportunity Commission, has engaged in his own erratic, dilatory conduct with respect to the prosecution of a claim of employment discrimination, then merely because of his change of status from that of charging party to that of plaintiff as a result of the issuance of a "right-to-sue" letter, does he thereby entirely escape accountability for the combination of his delays and those of the Commission, and thus wipe out all application of the equitable defense of laches?

STATUTES, REGULATIONS, AND PRINCIPLES OF LAW INVOLVED

(a) The pertinent provisions of Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f)(1), are:

> ". . . [I]f within one hundred and eighty days from the filing of [a] charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent

named in the charge (A) by the person claiming to be aggrieved . . ."[1]

(b) Sections 706 (g) & (h) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(g) & (h), specify that lawsuits brought pursuant to that legislation are equitable in nature.

(c) The applicable portion of the Rules and Regulations of the Equal Employment Opportunity Commission, 29 CFR §1601.25a(c), as those provisions existed at the time relevant to this case mandated that the Commission promptly issue a "right-to-sue" notice to a charging party "at any time after the expiration of sixty (60) days from the date of the filing" of such charge.[2]

(d) The Rules and Regulations of the Equal Employment Opportunity Commission, 31 Fed. Reg. 2833 (Feb. 17, 1960), 29 CFR §1602.14 (1977), require, in appropriate part, that employment records relevant to a charge of discrimination be maintained until that charge is finally resolved.

(e) Laches is an equitable defense which conceptualizes prejudice to one party resulting from lack of

[1]Prior to being amended in 1972, the Civil Rights Act of 1964 provided that a charging party could bring a private lawsuit against an employer sixty (60) days after the charge was filed with the Equal Employment Opportunity Commission. 42 U.S.C. §2000e-5(e).

[2]After the Civil Rights Act of 1964 was amended in 1972, the period of time set forth above was extended to 180 days after the filing of a charge. 29 CFR §1601.25b(c).

diligence by the other. *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 215-216 (1963).

STATEMENT OF THE CASE

The plaintiff, Fowler, filed a charge of racial discrimination with the Equal Employment Opportunity Commission on December 14, 1970. He received a "right-to-sue" letter from that agency on January 30, 1976, (42 U.S.C. §2000e-5(f)(1)), and brought this lawsuit on March 26, 1976, under the Civil Rights Acts[1] of 1866 and 1964, the latter as amended, 42 U.S.C. §1981 and 42 U.S.C. §2000e, *et seq.*, asking compensatory, injunctive and other appropriate relief for himself and for a class he purported to represent.[2]

Before answering, Blue Bell filed a Motion To Dismiss (11)[3] based on time limitations specified in Title VII, and on the Alabama one-year statute of limitations, Title 7, §26, Code of Alabama, 1940 (Recomp. 1958). That Motion was denied. Thereafter, Blue Bell filed its Answer and raised as affirmative defenses the equitable doctrine of laches with respect to the Title VII aspects of the case, and the Alabama statute of limitations, noted above, with respect to the Section 1981 aspects (17-19).

[1]The Civil Rights Act of 1866 will be referred to hereafter as "Section 1981"; the Act of 1964, as amended, will be referred to as "Title VII".

[2]There was no class certification.

[3]Numbers in parentheses refer to pages in the Joint Appendix filed in the Court of Appeals and now on file with this

Based on the foregoing defenses, Blue Bell moved for Summary Judgment (13, 20, 23), and offered in support thereof the Affidavit of Richard M. Warren, its Secretary & General Counsel (36-73), and the Deposition of Bertram N. Perry, Deputy Director of the Birmingham District Office of the Equal Employment Opportunity Commission (74-123). With respect to those aspects of the Motion based on laches, Fowler submitted in opposition the Affidavit of William D. Davis, III, Law Clerk for his counsel (21-22). Fowler did not oppose the application of the Alabama one-year statute of limitations (21-22).

All of the facts presented to the Court below were contained in the documents just described.[1] On the basis of those facts, the Court granted Blue Bell's Motion for Summary Judgment at a hearing held on October 21, 1976. A Judgment in favor of the Company, together with Findings of Fact and Conclusions of Law, was entered on November 30, 1976. Appx. 9a-20a.

The plaintiff, Fowler, appealed; the Equal Employment Opportunity Commission filed a brief as *amicus curiae;* and argument was heard on November 7, 1978, by a panel of the Court of Appeals for the Fifth Circuit.

Court. Since more than one number appears on many of those pages, references in this Petition will be to the numbers which are printed at the top center of the various pages.

[1]An outline of those facts appears in the Findings of Fact and Conclusions of Law as entered by the District Court. Appendix to this Petition (Appx., hereafter), at pages 9a-19a.

That same panel also heard the case of *Bernard v. Gulf Oil Company, supra.* Thereafter, in a letter dated March 19, 1979, counsel were advised that further consideration of the *Fowler* case was being withheld pending decision in the *Bernard* case.

The issue that these two cases have in common is the application of the equitable defense of laches to private Title VII actions. In both decisions, the Court of Appeals, as most succinctly stated in the *Bernard* opinion, held that "... plaintiffs' failure to file their Title VII [complaint] until completion of the EEOC process was not inexcusable delay and could not support the application of laches." *Bernard v. Gulf Oil Company,* 596 F. 2d at 1257.

Blue Bell petitioned the full Court for a rehearing on this holding, as stated in the *Fowler* case at Appx. 4a-5a. Gulf Oil Company, in a petition filed on the same day, likewise suggested that the adverse holdings in the *Bernard* case be reheared *en banc*. Gulf's petition was granted. Appx. 21a-22a. Blue Bell's petition was denied. 601 F. 2d 1195 (5th Cir., 1979).

REASONS FOR GRANTING THE WRIT

The express holding of the Court of Appeals in both the *Fowler* and the *Bernard* cases necessarily has the practical effect of taking away from all defendants in private Title VII actions the valuable and fundamental defense of laches, a defense heretofore recognized as being applicable to such actions. Accordingly, it is respectfully submitted that the decision of the Court of

Appeals is in conflict with decisions of this Court and other decisions of the Court of Appeals for the Fifth Circuit, as well as decisions of the Court of Appeals for the Seventh Circuit. Likewise, this decision involves a substantial question of law in the field of employment discrimination which is both important and recurring.

I.

Preliminary Statement

In assessing the reasons stated herein for granting a writ in this case, it is first necessary to be cognizant of the actions, in chronological sequence, taken by both Fowler and the Equal Employment Opportunity Commission ("EEOC" or "Commission", hereafter), with respect to the underlying charge of discrimination. In this regard, reference is invited to the Findings of Facts and Conclusions of Law entered by the District Court, Appx. 9a-19a, and to the Joint Appendix presently on file with this Court (36-73, 78-81, 109-123).

II.

The Decision Of The Court Of Appeals Effectively Reduces The Equitable Defense Of Laches To A Mirage

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(e), specifically afforded Mr. Fowler the absolute right to bring a private action, and to have a court-appointed attorney, sixty (60) days[1] after he filed his charge on December 12, 1970. That is, as early as mid-

[1]This statutory right was carried forward in the amendments to Title VII enacted in 1972, except that the period was extended to 180 days after the filing of a charge. 42 U.S.C. §2000e-5(f)(1). The EEOC Regulation also reflected that change. 29 CFR §1601.25b(c).

February, 1971, Fowler could have sued, regardless of the inaction on the part of the EEOC.

This Court, in the case of *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), held that the fundamental and valuable defense of laches is applicable to private Title VII lawsuits. There, the District Court had said that:

> ". . . The plaintiffs' claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. . . ."
>
> *Moody v. Albemarle Paper Co.*,
> 4 FEP Cases 561, 570 (E.D.N.C., 1971)

". . . The [district] court concluded that the petitioners had been 'prejudiced' by [the] conduct [of the plaintiff]. The Court of Appeals reversed on the ground 'that the broad aims of Title VII require that the issue of backpay be fully developed and determined even though it was not raised until the post-trial stage of litigation,' 474 F. 2d, at 141.

". . . But a party may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party. . . . To deny back-

pay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII . . ." [Court's emphasis].

Albemarle Paper Co. v. Moody,
422 U.S. at 423-424

Further recognition of the application of this defense to Title VII actions is found in the case of *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355 (1977).

"It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief.[1] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-425, 45 L.Ed 2d 280, 95 S. Ct. 2362. *The same discretionary power 'to locate "a just result" in light of the circumstances peculiar to the case,' ibid., can also be exercised when the EEOC is the plaintiff*" [emphasis supplied].

Occidental Life Insurance Co. of California
v. EEOC, 432 U.S. at 373

[1]In the *Albemarle Paper* case, *supra*, laches was involved *only* with respect to the "initially disclaimed" back pay claims which were first asserted "five years after the complaint [which otherwise was timely] was filed." 422 U.S. at 423. In light of the discretionary power of the trial court to reach "a just result", the Petitioner suggests that there is no limitation on the nature of the relief that may be granted to a defendant as a result of laches, and that none should be read into the foregoing statement.

When the Court of Appeals held, as a matter of law, that no inexcusable delay may arise where a private plaintiff, regardless of his own erratic and dilatory conduct, does not sue until the EEOC has completed its processes—and that neither may the EEOC's delays in completing its processes be considered—the necessary result thereof is that the defense of laches in private Title VII actions is reduced to a chimera and can never, in reality, be available to defending employers, albeit that Title VII actions are, by statute, equitable in nature, 42 U.S.C. §2000e-5(g)&(h), and that the foregoing cases expressly recognize this defense.

For all practical purposes, what was given on the one hand by statute and by the foregoing decisions was taken away by the decision of the Court of Appeals when, as most clearly stated in the *Bernard* case, it held that ". . . plaintiffs' failure to file their Title VII [complaint] until completion of the EEOC process was not inexcusable delay and *could not* support the application of laches" [emphasis supplied]. 596 F. 2d at 1257.

That is, no matter how many years the EEOC might consume with its administrative processes, and no

matter that the private plaintiff, as in this case, followed an erratic and completely dilatory course, and no matter how much irreparable prejudice the defendant might suffer in the interim period (for example, that all records had become destroyed by act of God, or that all witnesses had died, or whatnot), the mere act of the EEOC in "passing" the underlying charge to the private plaintiff by means of a right-to-sue letter would, inevitably, have the effect of cleaning the slate insofar as delay is concerned. Under this decision of the Court of Appeals, changing the identity of the complaining party serves to transform the action and to place the elapsed time and prejudice beyond the equitable reach of the courts.

This conclusion becomes even more compelling when it is noted that Title VII bars private actions unless they are filed within ninety (90) days after receipt of the right-to-sue letter. 42 U.S.C. §2000e-5(f)(1). Thus, if the delays of the EEOC are placed beyond consideration, as this decision has done, there is no way, in actual application, by which laches could ever be used in private actions.

This result is directly contrary to the decisions of this Court.

Moreover, it does not take into account that this and all defending employers—although each enters such proceedings with the legal presumption of having fully obeyed the law—are helplessly and completely left "holding the bag" with respect to prejudicial delays over

which they have *no* control, but over which private plaintiffs have total control. For, as has been emphasized above, Fowler had the complete right sixty (60) days after the filing of his charge to demand and obtain from the Commission a letter permitting and authorizing him to file suit—and incidentally to have also a Court appointed attorney institute such suit for him. 42 U.S.C. §2000e-5(e) and 29 CFR §1601.25a(c). Instead, this decision accords to private plaintiffs the power simply to side-step any accountability for years of delay and even their own dilatory conduct, and allows them to act with total indifference to the obligations they legally and necessarily assume when they cast themselves in the role of complainants.

III.

The "Reliance-On-The-EEOC" Rational Is Inherently Defective

The Court of Appeals for the Fifth Circuit in the case of *Franks v. Bowman Transportation Co.*, 495 F. 2d 398 (5th Cir., 1974), 424 U.S. 747 (1976), expressly recognized the application of the defense of laches to private Title VII actions.

There, the plaintiff, through no negligence or "fault" on his part, did not actually receive the first right-to-sue letter mailed to him by the EEOC. Over a year later, he secured a second such letter and thereafter filed his Complaint. The trial court held that Franks' action was barred by the (then applicable) 30-day limitation in Title VII for bringing suit.

That holding was reversed on the ground that Title VII requires actual, rather than constructive, notice to a plaintiff of his right to sue. Significantly, the Court of Appeals went on to state that on remand the District Court *should consider* the application of laches.

> "One further matter relating to the time suit was filed remains to be considered, and that is the applicability of the doctrine of laches.
>
> . . .
>
> ". . . In an equitable action, equitable defenses may be raised, and these include the doctrine of laches. In the proper case, laches might be applied to bar a claim entirely, or it might bar only part of the remedy sought, such as the back pay award or a portion of it. See *United States v. Georgia Power Co., supra* at 923. We do not intimate any view as to the applicability of laches to this case, for the district court should make such a determination in the first instance.
>
> ". . . Since the question of Franks' tardiness in initiating suit was called to the attention of the district court, *on remand it should specifically consider the applicability of laches*" [*emphasis supplied*].
>
> *Franks v. Bowman Transportation Co.*,
> 495 F. 2d at 406

Clearly, Franks had "relied" on the EEOC (and the Postal Service), and was not "at fault" concerning receipt of the first right-to-sue letter. Yet, the Court of

Appeals, faced with, and expressly recognizing those facts, specifically suggested the application of laches.

In the case now at hand, the District Court found,[1] on uncontroverted facts, that Fowler had demonstrated inaction and lack of diligence throughout the interim years. Appx. 16a-18a. Such actions as he, and the EEOC, did take were erratic, misleading, and dilatory. All the while, Fowler occupied a position of having an absolute, unfettered, statutory right to bring a private action *at any time* after sixty (60) days from the filing of his charge in December, 1972.[2] Yet he, unlike Blue Bell, is held not to be affected by the "fortuitous variables" of the EEOC processes.

> ". . . [I]t is not necessary either for the Commission to state in its notice [of right to sue] that it has been unable to obtain voluntary compliance or for the Commission to have engaged in any attempt at conciliation whatsoever. The sole purpose of this [notice] requirement is to provide a formal notification to the claimant that his administrative remedies with the Commission have been exhausted. Significantly, under EEOC regulations [29 CFR §1601.25a(c)], a right to demand and receive such a notice accrues

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[1]The District Court's decision was based expressly on the *Bowman Transportation* and *Albemarle Paper* cases, supra. Appx. 15a.

[2]On the other hand, there was absolutely no recourse available to Blue Bell with respect to the years of delay which occurred before this lawsuit was filed. Appx. 17a.

sixty days after the charge is filed *regardless* of any act or omission by the EEOC. Were this regulation not written, we would read it into the Act lest a claimant's statutory right to sue in federal court become subject to such fortuitous variables as work-load, mistakes, or possible lack of diligence of EEOC personnel" [emphasis supplied].

Beverly v. Lone Star Lead Construction Corp.,
437 F. 2d 1136 at 1140 (5th Cir., 1971)

Accordingly, the decision of the Court of Appeals in the present case is opposite to the laches aspects of other decisions on its own part—and this notwithstanding the uncontroverted facts, as found by the District Court, concerning prejudice and delay on the part of both Fowler and the Commission. The unerring effect of the Court of Appeals' decision is to create a situation in which the private plaintiff would *always* be in a position simply to say that he waited—no matter how long—until the Commission issued a right-to-sue letter —and that this "reliance" on the EEOC insulates him from the legal effect of any prejudice which might have occurred to the defendant during the interim period.

Aside from being contrary to the *Franks* case, *supra*, the decision now under consideration also is contrary to a recent holding of the Court of Appeals for the Seventh Circuit.

The case of *Kamberos v. GTE Automatic Electric, Inc.*, 603 F. 2d 598 (7th Cir., 1979), involved a "failure-

to-hire" allegation brought pursuant to Title VII. Although the plaintiff filed her charge with the EEOC in March, 1969, and her complaint in the District Court in January, 1974, this decision does not consider or otherwise address itself to the issue of laches. Rather, the issue was whether the plaintiff, who prevailed at trial, was entitled to back pay for the entire period after her charge was filed with the EEOC. Because the plaintiff had an absolute, statutory right to obtain from the EEOC a right-to-sue letter, the Court of Appeals held in the negative, as follows:

"The court did overlook one factor in computing the amount of backpay. Regulations passed pursuant to 42 U.S.C. §§2000e *et seq.* provide that an aggrieved party may request a right to sue letter any time after 180 days following the filing of a charge with the EEOC. 29 CFR §1601.28 (1978). In *Lynn v. Western Gillette, Inc.* 564 F. 2d 1282, 1287 (9th Cir., 1977), the Ninth Circuit stated that the 'complainant should not be permitted to prejudice the employer by taking advantage of the employer by taking advantage of the [EEOC's] slowness in processing claims, . . . [p]articularly where the aggrieved party has consulted counsel and is aware of this right.' In this case Kamberos not only retained counsel but is a lawyer herself. Nevertheless, she permitted her complaint to lie dormant with the EEOC for over four years, despite the fact that EEOC regulations provide for the automatic issuance of the right to sue letter upon request of the complainant any time 180 days

after the filing of the complaint with the EEOC. Under these circumstances the district court should have subtracted from the end of the backpay period an amount of time equivalent to the time between the expiration of the 180 day period and the date when the right to sue letter was actually received by the plaintiff . . ."

Kamberos v. GTE Automatic Electric, Inc., 603 F. 2d at 603

IV.

A Private Title VII Plaintiff Should Not Be Permitted To "Improve" His Position With Respect To Prejudicial Delays Merely By Obtaining A Right-To-Sue Letter From The EEOC

This Court has held that the defense of laches is applicable to actions brought by the EEOC, itself. *Occidental Life Insurance Co. of California v. EEOC, supra.* The Court of Appeals for the Fifth Circuit also has recognized the application of laches to the "private" remedy aspects of Title VII actions brought by the Commission. *United States v. Georgia Power Co.*, 474 F. 2d 906, 923 (5th Cir., 1973); *EEOC v. Griffin Wheel Co.*, 511 F. 2d at 456, 459 (fn. 5) (5th Cir., 1975); and *EEOC v. Louisville & Nashville* R.R. Co., 505 F. 2d 610 (5th Cir., 1974).[1] By "private" remedy, the Court of Appeals was referring to relief of an individual nature which the EEOC would obtain for a charging party whose allegations to the Commission formed the basis for that agency's lawsuit.

[1]See also: *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300 (M.D. Ga., 1975), as well as a number of District Court cases—eg., *EEOC v. Bell Helicopter Co.*, 426 F. Supp. 785 (N.D. Tex., 1976); *EEOC v. Metro Atlanta Girls' Club*, 416 F. Supp. 1006 (N.D. Ga., 1976); and *EEOC v. Moore Group., Inc.*, 416 F. Supp. 1002 (N.D. Ga., 1976)—in which the Administrative Procedure Act, 5 U.S.C. §706, was used as the basis for affording relief to defending employers where the EEOC had engaged in prejudicial delays incident to bringing its lawsuits.

The remedy the EEOC would have sought for Mr. Fowler as an individual, had it retained jurisdiction over this matter and sued in its own name, would have been precisely the same remedy that Fowler now seeks in his own lawsuit. The Court of Appeals, as noted in the cases cited above, has expressly recognized that the very delays and prejudice which have been demonstrated here would have served to foreclose the Commission from obtaining any relief for Fowler, had it sued in his behalf. Yet the Court of Appeals is saying that Fowler—merely because he was issued a right-to-sue letter—may not be "penalized", no matter what may have been the degree of delay or of prejudice to the defendant.

From the decision of the Court of Appeals, the conclusion is inescapable:—That a right-to-sue letter has the magical legal effect of transforming a case, against which the defendant can defend, into a case, against which the defendant cannot defend. In effect, the Court of Appeals is saying that when the EEOC belatedly

"passed" the matter over to Fowler, the interim years of delay and prejudice to Blue Bell were simply placed beyond the equitable reach of the District Court.

This result, entirely aside from being contrary to the cases cited herein, is, as observed by the District Court, one which surely would allow plaintiffs, ". . . in the name of equity, to work injustice on defendants without the discretionary restraint that rest with a Court sitting in equity." Appx. 15a.

V.

Applying The Defense Of Laches In This Particular Case Does Not Subvert The General Conciliation Provisions Of Title VII

In making the assessments set forth herein and requesting that a writ of certiorari be issued, Blue Bell does not overlook the position of conciliation in the scheme of Title VII,[1] as stated in the Court of Appeals' decision and in the *Occidental Life* case, *supra*.

One of the issues in the *Albemarle Paper* case, *supra*, was whether the application of laches in a given situation would have a general effect of narrowing the application of Title VII or detracting from its enforcement. This Court answered in the negative on both points, holding that the denial of a remedy to a particular plaintiff because his "*particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII . . ." [Emphasis in the original]. 422 U.S. at 424. Laches is an individualized defense, as to which each case stands on its own merits. Inasmuch as the decision with respect to a laches issue is based solely on the facts before the trial court, that decision does not, and cannot, have any far-reaching adverse effect on either the conciliation provisions of Title VII or on the enforcement scheme which it prescribes.

[1]That statutory scheme *also* is replete with manifestations of the Congressional intent that claims be resolved promptly—i.e., within a matter of days, not years. Charges must be filed within 180 days after the alleged unlawful practice occurs. 42 U.S.C. §2000e-5(e). The charged company must be notified within ten (10) days thereafter. 42 U.S.C. §2000e-5(b). The EEOC is admonished that its cause determinations, in order to be timely, must be made within 120 days after the filing of the charge. 42 U.S.C. §2000e-5(b). The charging party need wait only 180 days (60 at the time Fowler filed his charge) before having the right to sue. 42 U.S.C. §2000e-5(f)(1).

VI.

Blue Bell Acted In Good Faith, And The Prejudice To It Was Demonstrated And Unrebutted

The plaintiff's individual claim involved an alleged discriminatory failure to hire. The Complaint, however, contains "class" allegations which challenge practically every aspect of the employment relationship, including "recruitment, hiring, assignment, promotion, transfer practices and procedures as well as other terms, conditions and privileges of employment" (4).

In order for Blue Bell to bear its burden with respect to rebutting any *prima facie* case, which the plaintiff might establish, it would have to show why the plaintiff was not hired. Even under ideal circumstances,

proving a negative fact always is difficult and necessarily it would involve the recall and use of a wide range of detailed data. Here, however, Blue Bell would be called upon to deal with an individual who claims to have been an unsuccessful applicant — in 1970. He is a "stranger" to the defendant and had, at most, a *de minimis* amount of contact with the defendant. In addition, these considerations are multiplied immeasurably when the class allegations are taken into account.

The District Court, based on its review of the record and on the hearing it held with respect to Blue Bell's Motion For Summary Judgment, took into account the wide range of prejudice to the defendant which the uncontroverted facts in the record demonstrate. Appx. 12a-14a. As that Court's findings show, the basic sources of Blue Bell's defense have eroded and disappeared. For example, a document as fundamental as the application that Fowler supposedly filed in March, 1970, does not exist. The Personnel Manager—the individual responsible for hiring decisions and personnel policies at that time—"was discharged for cause in October, 1971, for reasons unrelated to the plaintiff's charge" and is now unavailable.[1] Appx. 12a. The passage of time

[1]The Court of Appeals' statement (Appx. 7a), that the only reason Blue Bell would need this individual as a witness is because he was the custodian of the personnel records, is entirely contrary to the undisputed facts in the record. As the District Court found:—"Business records and the independent recollections of the personnel and plant managers would be the sources from which the defendant would prepare its defenses, either as to the plaintiff himself or as to any class the plaintiff might seek to represent. Those sources are not available to the defendant." Appx. 13a-14a.

has had such effect both on witnesses and on a myriad of personnel records, which are relevant and essential to a meaningful defense.

The District Court made findings on each of these points. It concluded that Blue Bell had acted in good faith[1] with respect to the reinstituting of its normal record retention practices, and recognized that witnesses who would be critical to defense had become unavailable in any reasonable or practical sense of the word.

> ". . . [T]he Court concludes that the defendant's actions with respect to its business records and the personnel changes were made in good faith and were not a pretext or subterfuge for defeating the plaintiff's claim. This Court does not fault the defendant for taking these actions in light of the extensive lapse of time without there having been any action by either the plaintiff or the Commission." Appx. 18a.[2]

There are a number of facets to the prejudice suffered by Blue Bell. The Court of Appeals' decision, however, either entirely overlooks or discounts the nature

[1]As noted in Company memoranda, ". . . basically, the whole case does not make very much sense anyway, in that Fowler did not want to conciliate the matter in 1972, and now three years later it is being brought up again" (69). "[O]n July 25, 1972, we were notified by the EEOC that 'The Charging Party declined the Director's invitation to engage in settlement discussions.' We therefore *considered the matter closed* . . ." [emphasis supplied] (71).

[2]See also: *EEOC v. Moore Group, Inc.*, 416 F. Supp. at 1005 and *EEOC v. Bell Helicopter Co.*, 426 F. Supp. at 793.

and significance of this prejudice. The District Court's findings were reviewed without reference to the practical considerations—for example, the nature of the claim, namely, failure-to-hire, ongoing personnel turnover, the records retention policies in the Company's business, and the unusual lapse of time—upon which the District Court reached the conclusion that "[t]he equitable balance in this case has shifted to the defendant." Appx. 18a. Thus, not only did the Court of Appeals reject consideration of the delays hereinabove discussed, its decision likewise does not take into account the fact that the doctrine of laches, itself, conceptualizes the inevitable erosion of defenses resulting from the passage of time and, accordingly, affords relief to the defendant. The Court of Appeals' decision simply pays no heed to the very practical and realistic nature of the prejudice which has resulted from the inordinate delays of both the plaintiff and the Commission in this case.

CONCLUSION

Upon all the foregoing, the Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit, to the end that this Court may review the decision which has been rendered by that Court in the present case.

Respectfully submitted,
WHITEFORD S. BLAKENEY
W. T. CRANFILL, JR.
Attorneys for Petitioner

APPENDIX

INDEX TO APPENDIX

United States Court of Appeals

FOR THE FIFTH CIRCUIT

MARLON LOUIS FOWLER, Individually and
on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

BLUE BELL, INC., a corporation, et al.,

Defendants-Appellees.

No. 77-1179.

United States Court of Appeals,
Fifth Circuit.

June 15, 1979.

Rehearing and Rehearing En Banc
Denied Aug. 9, 1979.

William H. Ng, Atty., E.E.O.C., Washington, D. C., amicus curiae.

Robert L. Wiggins, Jr., Birmingham, Ala., for Plaintiffs-appellants.

Charles A. Powell, III, Birmingham, Ala., W. T. Cranfill, Jr., Whiteford S. Blakeney, Charlotte, N. C., Richard Moore Warren, Secretary & Gen. Counsel, Blue Bell, Inc., Greensboro, N. C., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before THORNBERRY, GODBOLD and HILL, Circuit Judges.

THORNBERRY, Circuit Judge:

This is a Title VII case. The district court granted summary judgment in favor of defendant after finding that laches barred plaintiff's claim. *Fowler v. Blue Bell, Inc.* 14 F.E.P. Cases (BNA) 1009 (N.D. Ala. 1976). We reverse.

Plaintiff Fowler applied for a job with defendant Blue Bell, Inc. in March and again in November, 1970. Defendant did not hire him. Fowler then filed a charge with the EEOC in December, 1970, alleging that Blue Bell had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by refusing to hire him because of his race. The EEOC notified Blue Bell of the charge in July, 1971, and served its Field Director's Findings of Fact on the company in December, 1971.

Blue Bell entered exceptions to these findings, but in June, 1972, the EEOC informed Blue Bell that the exceptions were "non-meritorious." At the invitation of the EEOC, *Blue Bell* agreed to participate in settlement discussions. Fowler, however, refused to participate. In July, 1972, the EEOC's Birmingham district office informed Blue Bell that Fowler "declined the Director's invitation to engage in settlement discussions. Accordingly, this office is forwarding the full investigation file to the Commission for determination as to reasonable cause. As soon as the determination is made, you will be notified." One year after it received this letter, having heard nothing else from the EEOC or Fowler, Blue Bell concluded "that the entire matter had been closed administratively by the EEOC" and destroyed all records relevant to Fowler's claim. Affidavit of Richard M. Warren, General Counsel to Blue Bell, Inc. The EEOC had not terminated its consideration, however, and issued a determination of reasonable cause in March, 1975. After further correspondence between the EEOC and Blue Bell, the EEOC decided not to file a civil action itself. It informed both Fowler and Blue Bell of this decision and sent Fowler a Notice of Right-to-Sue in January, 1976. Fowler filed this suit in March, 1976, within 90 days of receiving the EEOC Notice.

In *Bernard v. Gulf Oil, Inc.*, 596 F.2d 1249 (5 Cir. 1979), also decided today, we recognize that laches may apply to Title VII suits brought by private plaintiffs if the evidence indicates both that the plaintiff delayed inexcusably in bringing the suit and that this delay

unduly prejudiced defendants. *Id.* at 1256. As in *Bernard*, we hold that the evidence before the court on this summary judgment does not allow a finding that either of these elements exists.

Blue Bell argues that this conclusion is improper. First, it asserts that after it presented affidavits in support of its summary judgment motion, Fowler had the duty of submitting contrary evidence in order to raise an issue of fact. Blue Bell argues that since its affidavits alleged delay and prejudice and Fowler failed to dispute these allegations the summary judgment was proper. This argument is without merit. Fowler does not dispute that more than five years lapsed between the filing of his charge with the EEOC and the commencement of this suit. Nor does he disagree with Blue Bell's contention that it has lost personnel and destroyed records that would be helpful in deciding Fowler's claim. Fowler's argument is that these facts do not permit a finding of laches in this case. Therefore, his failure to submit controverting evidence to the trial court is irrelevant.

Blue Bell also argues that the district court's ruling was correct on the merits. It asserts that Fowler delayed inexcusably because he could have initiated this suit 60 days after filing the EEOC charge rather than waiting for five years while the EEOC investigated the claim. Although the EEOC regulations in 1970 did allow the claimant to withdraw his charge from the EEOC and file a private suit 60 days after he filed the charge,

35 Fed. Reg. 10006 (June 18, 1970) (currently at 29 C.F.R. 1601.25b(c) (1977)), this provision did not require Fowler to file suit at that time. As we noted in *Bernard*, 596 F.2d at 1256, the legislatively and judicially favored method of resolving Title VII claims is through the EEOC administrative process. Therefore, we should not penalize a claimant for awaiting the end of that process. Blue Bell argues, however, that this analysis is not applicable to the present case because Fowler's refusal to participate in settlement negotiations in July, 1972, was an abandonment of the EEOC and proved that he no longer wished to rely on the normal administrative process. This conclusion is also incorrect. EEOC regulations provide that after the field director issues findings of fact, the EEOC may invite the parties to engage in settlement discussions. 35 Fed. Reg. 3163 (Feb. 19, 1970) (currently at 29 C.F.R. 1601.-19a (1977)). Those regulations also recognize, however, that the parties may not wish to entertain settlement at that time and provides that the Commission may take further action as it deems necessary. In the present case, when Fowler refused to entertain settlement the EEOC informed Blue Bell that "this office is forwarding the full investigation file to the Commission for determination as to reasonable cause." Thus, it is clear that the EEOC did not consider Fowler's refusal to engage in predetermination settlement an abandonment of the EEOC process. In fact, Fowler's refusal to deal directly with Blue Bell merely allowed the EEOC to complete its normal investigation and conciliation pro-

cedures. Therefore, the mere fact that Fowler refused to postpone the EEOC's efforts in his behalf cannot support a finding that he was not entitled to await the completion of those efforts. Fowler's delay was therefore reasonable.

The Supreme Court's language in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977), supports this conclusion. The Court stated:

> It is, of course, possible that . . . a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief.

This language implies that, although the doctrine of laches may be available in some cases to bar the EEOC from bringing suit, this bar arises only if the EEOC has delayed unreasonably *after* it has completed conciliation efforts. We can perceive no reason to require private plaintiffs to file suit before the EEOC completes conciliation efforts if the EEOC itself is not so constrained. In this case, the delay of which Blue Bell complains occurred *before* the EEOC ended its conciliation efforts, because Fowler filed suit only 90 days after that date.

Blue Bell's contention that Fowler's delay seriously prejudiced its defense of the case is also without merit.

Blue Bell asserts two sources of prejudice. First, it argues that the testimony of several past personnel and plant managers is essential to Blue Bell's defense of the case and that these managers are no longer employed by Blue Bell. The mere assertion that these persons are not presently with the company is insufficient to support a finding of prejudice. Blue Bell must also show that they are unavailable to testify. *Akers v. State Marine Lines, Inc.*, 344 F. 2d 217, 221 (5 Cir. 1965). Blue Bell does allege that the personnel manager at the time Fowler filed his complaint is now unavailable. The primary reason Blue Bell alleged that this individual's personal testimony is necessary, however, is that he was the custodian of records relevant to Fowler's charge and Blue Bell has since destroyed those records. Blue Bell knew of Fowler's charge soon after it was filed. In July, 1972, the EEOC informed Blue Bell that it was considering Fowler's charge for a determination as to reasonable cause and told Blue Bell: "As soon as the determination is made, you will be notified." Despite this explicit statement, and without asking the EEOC about the status of the charge, Blue Bell concluded in 1973 that the EEOC was no longer pursuing Fowler's claim and destroyed all records relevant to the claim. Blue Bell's destruction of these records violated clear EEOC regulations. 31 Fed. Reg. 2833 (Feb. 17, 1966) (currently at 29 C.F.R. 1602.14 (1977)). Thus, any prejudice to Blue Bell was the result of its own negligence and disregard of administrative regulations rather than Fowler's delay. *Bernard* at 1256.

We conclude that the facts adduced on Blue Bell's summary judgment motion do not allow findings of either unreasonable delay by Fowler or undue prejudice to Blue Bell. Therefore, the district court's finding that laches bars Fowler's claim was an abuse of its discretion to locate a just result. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 424, 95 S. Ct. 2362, 2375, 45 L. Ed. 2d 280 (1975).

The judgment of the district court is REVERSED and the case REMANDED.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARLON LOUIS FOWLER, individually and on behalf of all others similarly situated,
Plaintiff

vs.

BLUE BELL, INC., a corporation, et al.,
Defendants

Civil Action No. 76-M-0431-S

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

This action was brought pursuant to the Civil Rights Acts of 1964 and 1886, 42 U.S.C. §§2000e, et seq. and 42 U.S.C. §1981, respectively. The defendant moved for summary judgment on the grounds that: (a) the Title VII aspects of the case were barred by the equitable doctrine of laches; and (b) the Alabama one-year statute of limitations barred such aspects as were based on the Act of 1866.

The Court, upon consideration of the Defendant's Motion For Summary Judgment, the affidavits associated with that Motion, the plaintiff's response in opposition, the deposition of Mr. Bertram N. Perry, Deputy Director of the Birmingham District Office of the Equal Employment Opportunity Commission, the memoranda submitted by both parties, as well as the arguments of their counsel, granted the defendant's Motion For Summary Judgment at a hearing held on October 21, 1976.

FINDINGS OF FACT

1. The defendant operates a garment manufacturing plant at Oneonta, Alabama. The plaintiff applied for a job at that plant in March, 1970, and inquired about employment in November of that year. When he was not hired, the plaintiff filed a charge of racial discrimination with the Equal Employment Opportunity Commission ("EEOC" or "Commission" hereafter) in December, 1970.

2. On July 22, 1971, the defendant was first notified of the charge, and the EEOC thereafter conducted an investigation. The principal participants for the defendant were the Oneonta plant manager and its personnel manager. They were directly responsible for submitting information and position statements to the Commission based on their personal knowledge, as well as on business records which existed at that time.

3. Following the investigation, the EEOC forwarded to the defendant a document entitled "Field Director's Findings of Fact" on December 15, 1971. The defend-

ant considered those findings to be erroneous. Accordingly, it submitted detailed Exceptions. On June 24, 1972, the Commission informed the defendant that its Exceptions had been found to be "non-meritorious."[1] It invited the defendant "to engage in settlement discussions."

4. In a letter dated June 30, 1972, the defendant accepted the Commission's offer. The plaintiff, however, "declined the Director's invitation to engage in settlement discussions." His decision was communicated to the defendant by means of a letter from Bertram N. Perry, acting Deputy Director of the Birmingham District Office, dated July 25, 1972. The foregoing letter was the last communication between the defendant and the EEOC or the plaintiff until March 25, 1975, at which time the Commission forwarded to the defendant a "Determination" stating that there was cause to believe the plaintiff had been subjected to discrimina-

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[1]The Court does not express an opinion with respect to the merits of those Findings of Fact. It does, however, note what clearly appears to be an error concerning a highly significant aspect of the investigation. The EEOC found that 11 blacks out of a workforce of 535 was "less than 1%" when in fact, that fraction computes to a black utilization of 2.1%. The EEOC arbitrarily refused to consider this obviously erroneous computation when it found the defendant's exception to be non-meritorious. This, however, was a significant fact because the availability of blacks in the Blount County workforce was shown to be 2.1%. In this regard, it is further noteworthy that each of the investigative affidavits (eight in number) taken by the EEOC and attached to the deposition of Bertram N. Perry, except for the plaintiff's, state that the defendant does not discriminate against blacks.

tion.[1] On January 30, 1976, the EEOC issued the plaintiff a "right-to-sue" letter after having decided not to bring a Commission lawsuit against the defendant. The plaintiff filed this action on March 26, 1976, approximately five and one-half years after he submitted his charge to the EEOC.

5. In the period between the time the plaintiff made his allegation of discrimination in December, 1970, and the filing of this lawsuit on March 26, 1976, the following changes took place with respect to the defendant's Oneonta Plant:

(a) The personnel manager at the time the plaintiff applied, as well as during the EEOC administrative investigation, was discharged for cause in October, 1971, for reasons unrelated to the plaintiff's charge. The defendant does not know where this person is or how to get in touch with him.

(b) The replacement for the foregoing personnel manager left the Company in June, 1975, after which the incumbent personnel manager assumed those duties.

(c) The Oneonta plant manager at the time of the charge and investigation has since moved to Europe where he works for a subsidiary of the Company.

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[1]The Court notes that the "Determination" perpetuates the same mathematical error with respect to the defendant's black utilization. In that document, the Commission found that 11 blacks out of 524 employees (as opposed to the total employment of 535 which was set forth in the Field Director's Findings of Fact) was "less than one percent."

(d) There have been two personnel clerks since the incumbent, at the time the plaintiff applied, left the Company.

(e) Over a year after the plaintiff refused to discuss settlement, the defendant reached a good faith conclusion, based on the inaction of both the plaintiff and the Commission, the lapse of time, and the plaintiff's decision with respect to settlement that the case had been closed by the EEOC and that the plaintiff was not going to bring a private action. The defendant then resumed normal office procedures at Oneonta. Personnel files and records which existed at the time of the charge and the EEOC investigation have been destroyed. The defendant resumed its practice of systematically destroying applications within three years after they were filed, thereby making it impossible to determine now who may have competed with the plaintiff for whatever jobs may have been open at that time, or to evaluate relative qualifications.

(f) Personnel folders are available only from 1972 to the present. Accordingly, it would not be possible to reconstruct the pre-1972 workforce.

(g) The defendant has no records, files or other means of racially identifying former employees. EEO-1 Reports are based on visual surveys. They, however, do not establish which jobs (in terms of plant classifications) minority employees held.

6. Business records and the independent recollections of the personnel and plant managers would be

the sources from which the defendant would prepare its defenses, either as to the plaintiff himself or as to any class the plaintiff might seek to represent. Those sources are not available to the defendant.

7. Although the plaintiff had an absolute right to request and to receive a right-to-sue letter at any time after 60 days from the day he filed his charge of discrimination in December, 1970, the plaintiff never exercised that right. EEOC Regulation §1601.25a(c) (Jan., 1970). Nor did the plaintiff contact the Commission during the interim years for the purpose of inquiring about his case, or for any other purpose.

8. The matters set forth in the Affidavit submitted in support of the defendant's Motion were not controverted by the plaintiff. The plaintiff did, however, assert that the defendant could have requested the Commission to issue a right-to-sue letter to the plaintiff. Contrary to that assertion, the Court, based on the deposition of Bertram N. Perry and on the EEOC Regulation §1601.25b(c), finds that the Commission would not have issued such a letter to the plaintiff on the request of the defendant. There was no action the defendant could have taken to effect an earlier resolution of the plaintiff's claim.

CONCLUSION OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Those aspects of this action which are based on 42 U.S.C. §1981 are barred by the Alabama one-year

statute of limitations, Title 7, §26, Code of Alabama, 1940 (Recomp. 1958). *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Beard v. Stephens*, 372 F. 2d 685 (5th Cir. 1967); *Sewell v. Grand Lodge of Int'l. Association of Machinists & Aerospace Workers*, 445 F. 2d 545 (5th Cir. 1971), cert. den., 404 U.S. 1024 (1972); and *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973).

3. Actions brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, are equitable in nature. 42 U.S.C. §2000e-5(g) and (h). See also, *Franks v. Bowman Transportation Company*, 495 F. 2d 398, 406 (5th Cir. 1974), reversed on other grounds, . . . U.S. . . . , 47 L. Ed. 2d 444 (1976).

4. Laches is an equitable doctrine generally held to be applicable where there has been a lack of diligence by the plaintiff and injury or prejudice to the defendant due to that inaction. The doctrine is applicable to Title VII actions brought by private plaintiffs. *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975). See also, *Franks v. Bowman Transportation Company, supra*. Although the mandate of Title VII has been construed to be broad, actions brought thereunder remain subject to the traditional principles of equity. To hold otherwise would be to permit plaintiffs, in the name of equity, to work injustice on defendants without the discretionary restraint that rests with a Court sitting in equity.

5. The application of the doctrine of laches is a matter which arises from the facts of each individual case.

The Court, upon consideration of all the facts and circumstances presented incident to the defendant's Motion for Summary Judgment, concludes that the Motion should be granted. The defendant has been substantially and irreparably prejudiced by the plaintiff's lack of diligence in pursuing his claim. The granting of this summary judgment, based on that prejudice, will not serve to defeat justice but will serve to prevent the working of an injustice on the defendant.

6. The Court is not unmindful of the time consumed by the Commission in this case. It also has considered the plaintiff's assertion that he was following EEOC procedures in bringing this lawsuit. The Court concludes, however, that the foregoing considerations are not sufficient to prevail in the face of the following factors:

(a) Separate and apart from the Commission's role in this case is the demonstrated and unrebutted lack of diligence and inaction on the part of the plaintiff. First, the plaintiff refused even to discuss settlement in July, 1972, although the EEOC would have required a full remedy in his behalf as the justification for the plaintiff waiving his right to sue incident to such a settlement. By that refusal, the plaintiff turned his charge toward a judicial resolution. Nevertheless, he sat back and permitted nearly four additional years to elapse before bringing this action. During that time, he contacted neither the Commission nor the defendant.

(b) Pursuant to EEOC Regulation §1601.25a(c) and its successor, §1601.25b(c), the plaintiff had an absolute right to request and to receive a right-to-sue letter from the Commission at any time after 60 days from the filing of his charge in December, 1970.[1] The EEOC had no discretion with respect to issuing such a letter. Accordingly, based on the statute itself, 42 U.S.C. §2000e-5(f)(1), and the foregoing Regulations, the Court concludes that the plaintiff had notice of his right to obtain a suit authorization and that, at the least, the plaintiff was on notice that he should contact the Commission with respect to his charge, particularly after his refusal to discuss settlement.

(c) The plaintiff had the right and the means of moving toward a resolution of his claim by means of a private lawsuit. He, however, did not act, either to bring such a lawsuit or to contact the Commission in that regard. The Court concludes that during those interim years, the defendant's ability to defend itself was irreparably prejudiced and effectively eliminated by the personnel changes and the good-faith resumption of

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[1]Although the plaintiff asserted in his Memorandum and the Affidavit attached thereto that the defendant also had a right to request the Commission to issue a right-to-sue letter to the plaintiff, the Court concludes that the defendant did not, in fact, have such a right. The language of EEOC Regulation §1601.25a(c) supports the plaintiff's assertions; however, the deposition of Mr. Perry clearly establishes that the Commission would not have issued such a letter at the request of the defendant. This is corroborated by the successor Regulation, EEOC Regulation §1601.25b(c). Accordingly, there is no merit to the plaintiff's argument in this regard.

normal office procedures at the Oneonta Plant.[1] The record of this case establishes that the people and the documents with which the defendant would prepare its defenses no longer are available or no longer exist.

7. Title VII is remedial legislation which is broadly construed by this Court. That consideration, however, does not outweigh the duty which rested with this plaintiff to take steps to pursue his claim in a timely fashion without regard to the actions, or lack thereof, by the Commission. This is especially true in light of the plaintiff's refusal to engage in settlement discussions when that course was offered by the Commission and accepted by the defendant on July 30, 1972. The equitable balance in this case has shifted to the defendant. Aside from, and not controlled by, the general undesirability of defending stale claims, this Court, based upon all of the facts and circumstances, concludes that the specific prejudice caused to the defendant by the

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[1]The Court recognizes that Title VII respondents are required to maintain records with respect to charges of discrimination. The Court also recognizes that the defendant's Oneonta Plant is an on-going business, the operations of which are not susceptible to being suspended for years at a time because of an allegation of discrimination. Based on the uncontroverted Affidavit and attachments which accompanied the defendant's Memorandum, the Court concludes that the defendant's actions with respect to its business records and the personnel changes were made in good faith and were not a pretext or subterfuge for defeating the plaintiff's claim. This Court does not fault the defendant for taking these actions in light of the extensive lapse of time without there having been any action by either the plaintiff or the Commission.

plaintiff's lack of diligence clearly yields a situation in which it would be unjust to permit this action to proceed.

This 30th day of November, 1976.

FRANK H. MCFADDEN
United States District Judge

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF
ALABAMA
SOUTHERN DIVISION

MARLON LOUIS FOWLER, individually and on behalf of all others similarly situated,
Plaintiff

vs.

BLUE BELL, INC., a corporation, et al.,
Defendants

Civil Action No. 76-M-0431-S

JUDGMENT

Having heard the Defendant's Motion for Summary Judgment and having considered the matters presented by the parties incident thereto, it is THEREFORE, ORDERED, ADJUDGED AND DECREED THAT the plaintiff shall have and recover nothing by his action and that judgment be, and hereby is, entered in favor of the defendant. Costs shall be taxed to the plaintiff.

ENTERED this 30th day of November, 1976.

FRANK H. MCFADDEN
United States District Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 77-1502

WESLEY P. BERNARD, et al.,
Plaintiffs-Appellants,

versus

GULF OIL COMPANY, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

On Petition For Rehearing and Petition For Rehearing En Banc
(Opinion *June 15*, 1979, 5 Cir., 197—, —F 2d—).

(September 27, 1979)

Before BROWN, Chief Judge, COLEMAN, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, JOHNSON, GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON and RANDALL, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc

and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Judges Goldberg and Ainsworth have recused themselves and did not participate in this decision.